BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12	)	**MM Docket No. 92-265**
and 19 of the Cable Television	)	
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

To: The Commission

REPLY OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

B.R. Phillips, III
Chief Executive Officer
National Rural Telecommunications Cooperative

John B. Richards
Barry J. Ohlson
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210

Its Attorneys

Dated: July 28, 1993

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12	)	**MM Docket No. 92-265**
and 19 of the Cable Television	)	
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

REPLY OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), the National Rural Telecommunications Cooperative ("NRTC") hereby submits this Reply to the Oppositions filed in response to NRTC's Petition for Reconsideration ("Petition") of the First Report and Order ("Program Access Decision") adopted in the above-captioned proceeding on April 1, 1993.[1/]

I. REPLY

A. The Statutory Ban Against Exclusive Arrangements in Rural Areas Applies to Vertically-Integrated Cable Programmers, as well as to Cable Operators.

1. Section 76.1002(c)(1) of the Commission's Rules, which was adopted by the Commission to implement Section 628(c)(2)(C) of the Cable Act, prohibits

---

[1/] 58 Fed. Reg. 27658 (May 11, 1993).

certain practices by a cable operator that prevent a distributor from obtaining programming for distribution to persons in areas not served by a cable operator.[2/] Under the adopted rule, an exclusive arrangement between a vertically integrated cable programmer and a distributor that is not a cable operator is permissible.

2. In its Petition, NRTC pointed out that Section 76.1002(c)(1) of the rules does not reflect the broad scope of the prohibition contained in Section 628(c)(2)(C) of the Cable Act. Section 628(c)(2)(C) on its face does not proscribe conduct only by cable operators. Rather, it prohibits all "practices, understandings, arrangements, and activities. . . that prevent a multi-channel video programming distributor from obtaining such programming. . . for distribution to persons in areas not served by a cable operator. . .". 47 U.S.C. 547(c)(2)(C).[3/]

3. NRTC urged the Commission to expand the scope of Section 76.1002(c)(1) to reflect the broad language of the statute. In their Oppositions to NRTC's Petition, USSB, Viacom, Time Warner, Discovery and Liberty Media support a very limited interpretation of Section 628(c)(2)(C), largely

---

[2/] NRTC's constituency resides primarily in rural areas which are generally unserved by cable.

[3/] This straightforward statutory language is controlling and would supersede any conflicting legislative history. See, Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984). In this instance, however, there is no compelling legislative history to the contrary. The parties in Opposition merely point to language recognizing, as NRTC does, that exclusive contracts between a cable operator and a programming vendor must be prohibited. HR Conf. Rep. No. 102-862 102d Cong., 2nd Sess. at 92 (1992); See, e.g., Opposition of USSB, pp. 7-8; Opposition of Viacom, pp. 5-6. Nothing in the Conference Report states that Congress intended to prohibit only exclusive arrangements between cable

because USSB already has acquired programming from Viacom and Time Warner "with varying degrees of exclusivity to USSB vis-a-vis other DBS providers."[4/] Having already entered into their exclusive arrangement, USSB, Viacom and Time Warner are particularly anxious for the Commission to bless the concept of exclusivity between vertically-integrated cable programmers (such as Viacom and Time Warner) and non-cable distributors (such as USSB).[5/]

4. Because the USSB/Viacom/Time Warner deal involves vertically-integrated cable programmers and not cable operators, USSB/Viacom/Time Warner argue that Congress never intended to prohibit these types of arrangements in the Cable Act.[6/] USSB points to the proposed settlement of the pending Primestar Partners suit brought by 40 State Attorneys General against Primestar Partners, L.P. (including Time Warner) and other cable defendants (including Viacom), as evidence that high-powered DBS providers at the 101° orbital position may lawfully enter into exclusive contracts with cable programming providers. USSB claims that it is "unlikely that 40 states would have agreed to the provisions that recognize such exclusive contracts if there was any question as to whether the Cable Act prohibited such exclusive arrangements."[7/]

[4/] Opposition of Viacom, p. 7, note 4. There is no programming exclusivity involved in NRTC's DBS project with Hughes Communications Galaxy, Inc.

[5/] See, Opposition of Viacom, p. 7, note 4.

[6/] Time Warner implies that Congress has no interest in this issue because

5. The Primestar Partners antitrust suit, however, is hardly evidence of a lack of Congressional interest in prohibiting exclusive arrangements between non-cable distributors and vertically-integrated cable programmers. To the contrary, in the Primestar matter both the Honorable Billy Tauzin, the author of the Program Access amendment to the Cable Act, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and Finance of the House of Representatives, have expressed unequivocal disagreement with the statutory interpretation now put forth by USSB/Viacom/Time Warner and the other parties filing Oppositions to NRTC's Petition.[8/] Representative Tauzin and Chairman Markey believe, as does NRTC, that USSB's exclusive arrangement with Viacom and Time Warner is blatantly inconsistent with the Cable Act and will stifle the development of DBS.

6. Representative Tauzin specifically voiced his objection to the proposed sanctioning of DBS exclusives between cable programmers and non-cable distributors. He opposed the proposed Primestar settlement, specifically because it would permit Time Warner and Viacom to enter into exclusive contracts with USSB at the 101° orbital position. He unequivocally stated that such an exclusive arrangement would "undermine both the letter and the spirit of the 1992 Cable Act." (Emphasis added).

[8/] See, Letter from the Honorable Billy Tauzin, Member of Congress, to the Honorable John Sprizzo, United States District Court, dated June 16, 1993, and Letter from the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, to the Honorable Robert Abrams, Attorney General of the State of New York, dated July 1, 1993, attached hereto as Attachments "A" and "B," respectively.

7. Chairman Markey likewise expressed his extreme concern that by sanctioning exclusive arrangements for DBS, the proposed consent decree "enables the Primestar Partners to divide the DBS market for cable programming between one of the two DBS systems and Primestar, excluding the other major DBS provider at 101°.[9/] This arrangement is precisely the type of anti-competitive behavior we have

9. In fact, the wording of Section 76.1002(c)(1) of the Commission's rules, which limits application of the rule to "cable operators," appears to be nothing more than an inadvertent drafting error in a long and complex document. The

B. An Award of Damages May Be An "Appropriate Remedy" for Violation of the Program Access Rules.

11. Through the language of Section 628(e)(1), Congress conferred upon

13. Several Commenters have overreacted to NRTC's reference to Title II as an area in which the Commission traditionally has awarded damages.[15/] NRTC does not contend that Title II and Section 628 are "the same." Title II is just one example of an area where the Commission in the past has ordered damages as an "appropriate remedy." Similarly, depending on the circumstances, an award of damages could be an "appropriate remedy" for a Program Access violation. Had Congress intended to prohibit an award of damages or to deem such a traditional remedy to be "inappropriate" in Program Access cases, it could and presumably would have done so. Instead, in Section 628(e), Congress conferred expansive powers and wide discretion on the Commission.

14. Lastly, NRTC never requested that the Commission automatically assess damages in every complaint proceeding. Rather, the Commission should retain the discretion to award damages where "appropriate," as directed by the statute. For example, in the event a programmer has engaged in willful, gross or egregious conduct, involving a wide and unjustified disparity in pricing, the

C. The Commission Must Fully Examine the Cost "Justification" for Discrimination Against HSD Distributors Based on the Specific Facts of Particular Complaints.

15. In its Petition, NRTC expressed concern with several sweeping statements in the First Report and Order suggesting that the services provided by satellite broadcast programming vendors ("satellite carriers") to Home Satellite Dish ("HSD") distributors were more costly than services to other distributors. NRTC argued that the Commission should not pre-judge these types of costing issues, but should resolve them within the context of specific complaint proceedings.

16. Obviously, in light of the Petition and Oppositions, there is a genuine dispute of fact among the parties regarding the cost justification for HSD rates

II. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Federal Communications Commission to act in accordance with this Reply and to reconsider its First Report and Order in this proceeding as described above.

Respectfully submitted,

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

B.R. Phillips, III
Chief Executive Officer

By: John B Richards

John B. Richards
Barry J. Ohlson
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210

Its Attorneys

Dated: July 28, 1993

Attachment A

BILLY TAUZIN
THIRD DISTRICT, LOUISIANA

ENERGY AND COMMERCE COMMITTEE
MERCHANT MARINE AND FISHERIES COMMITTEE
CHAIRMAN, COAST GUARD AND
NAVIGATION SUBCOMMITTEE

WASHINGTON OFFICE:
TELEPHONE: 202-225-4031
2330 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

Congress of the United States
House of Representatives
Washington, DC 20515

DISTRICT OFFICES:

TELEPHONE: 504-589-6366
500 CAMP STREET
SUITE 1041
NEW ORLEANS, LA 70130

TELEPHONE: 504-876-3033
FEDERAL BUILDING, SUITE 107
HOUMA, LA 70360

TELEPHONE: 318-367-8231
210 EAST MAIN STREET
NEW IBERIA, LA 70560

TELEPHONE: 504-621-8490
ASCENSION PARISH COURTHOUSE EAST
828 SOUTH IRMA BLVD.
GONZALES, LA 70737

June 16, 1993

The Honorable John Sprizzo
United States District Court
Southern District of New York
U.S. Courthouse
Foley Square Room 612
New York, New York 10007

RE: Civil Action No. 93-CIV-____, The States of New York, California, Maryland, et. al. v. Primestar Partners and Civil Action No. 93-CIV-3913, U.S. v. Primestar Partners

Dear Judge Sprizzo:

I am writing you today to express my reservations about the antitrust consent decrees filed by the States' Attorneys General and the U.S. Department of Justice in the Primestar Partners matter. I am concerned with the effect these consent decrees may have on the development of full competition to the cable industry, particularly the impact these decrees will have on the direct broadcast satellite industry (DBS), potentially the most viable competitor to cable.

Last year, the Congress enacted the Cable Television

establishing the presumption that an agreement reached with the

Attachment B

ROOM H2-316
FORD HOUSE OFFICE BUILDING
PHONE (202) 225-2427

DAVID W. MOULTON
CHIEF COUNSEL AND STAFF DIRECTOR

U.S. House of Representatives

Committee on Energy and Commerce

SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

Washington, DC 20515-6119

July 1, 1993

The Honorable Robert Abrams
Attorney General of the
State of New York
120 Broadway
25th Floor
New York, New York 10271

Dear Bob:

I am writing to follow up conversations with your staff to urge your reconsideration of the proposed consent decree agreed to by the States Attorneys General with Primestar Partners.

Let me begin by congratulating you and your team on pursuing

exclusive arrangement between vertically integrated cable programmers and one DBS provider, shutting out the other, arguably stronger DBS competitor, would prevent that second DBS provider from offering such programming to its customers. It also runs afoul of the non-price discrimination provisions in Section 19(c) because it would condone a refusal to sell "to a particular distributor when the vendor has sold its programming to that distributor's competitor." (See para. 116 of the FCC's Report and Order). Finally, if the pricing of the exclusive contract between the first DBS operator and a vertically integrated programmer is higher than comparable rates charged to

Attachment C

LATHAM & WATKINS
ATTORNEYS AT LAW
1001 PENNSYLVANIA AVE., N.W., SUITE 1300
WASHINGTON, D.C. 20004-2505
TELEPHONE (202) 637-2200
FAX (202) 637-2201
TLX 590775
ELN 62793269

PAUL R. WATKINS (1899-1973)
DANA LATHAM (1898-1974)

CHICAGO OFFICE
SEARS TOWER, SUITE 5800
CHICAGO, ILLINOIS 60606
TELEPHONE (312) 876-7700
FAX (312) 993-9767

LONDON OFFICE
ONE ANGEL COURT
LONDON EC2R 7HJ ENGLAND
TELEPHONE + 44-71-374 4444
FAX + 44-71-374 4460

LOS ANGELES OFFICE
633 WEST FIFTH STREET, SUITE 4000
LOS ANGELES, CALIFORNIA 90071-2007
TELEPHONE (213) 485-1234
FAX (213) 891-8763

MOSCOW OFFICE
ULITSA DOVZHENKO 1
MOSCOW 119590 RUSSIA
TELEPHONE + 7-095-147 9518
FAX + 7-095-147 6252

NEW YORK OFFICE
885 THIRD AVENUE, SUITE 1000
NEW YORK, NEW YORK 10022-4802
TELEPHONE (212) 906-1200
FAX (212) 751-4864

ORANGE COUNTY OFFICE
650 TOWN CENTER DRIVE, SUITE 2000
COSTA MESA, CALIFORNIA 92626-1925
TELEPHONE (714) 540-1235
FAX (714) 755-8290

SAN DIEGO OFFICE
701 "B" STREET, SUITE 2100
SAN DIEGO, CALIFORNIA 92101-8197
TELEPHONE (619) 236-1234
FAX (619) 696-7419

SAN FRANCISCO OFFICE
505 MONTGOMERY STREET, SUITE 1900
SAN FRANCISCO, CALIFORNIA 94111-2586
TELEPHONE (415) 391-0600
FAX (415) 395-8095

July 16, 1993

BY HAND DELIVERY

The Honorable John E. Sprizzo
United States District Court for the Southern District of New York
U.S. Courthouse
Foley Square, Room 612
New York, New York 10007

Re: State of New York, et al., v. Primestar Partners L.P., et al., Civil Action No. 93-CIV-3638 (JES)

Dear Judge Sprizzo:

Pursuant to the Court's Order of June 17, 1993, we are filing today the Joint Amicus Curiae Memorandum of Law of DirecTv, Inc., the National Rural Telecommunications Cooperative, the Consumer Federation of America, and the Television Viewers of America. These amici curiae respectfully request this Court therein to either reject the proposed Consent Judgments in the above-captioned action, or to condition its approval on certain modifications.

For the convenience of the Court, we are also filing with our brief three appendices containing copies of sources which may be difficult for the Court to obtain readily, such as the Federal Communications Commission's rules addressing access to cable programming, recently promulgated pursuant to the Cable Television Consumer Protection and Competition Act of 1992.

Finally, because of page limitations, we have not cited or included testimony to support certain factual assertions made in the brief, but stand ready to do so should the Court so desire.

The amici greatly appreciate the opportunity to present their objections to the proposed settlement. Thank you for your consideration.

Respectfully submitted,

Gary M. Epstein
of LATHAM & WATKINS

Attorneys for DirecTv, Inc.

Enclosures

cc: Counsel for all parties (with encl.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

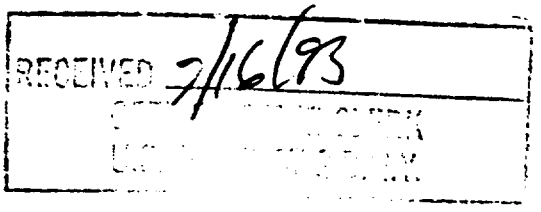
THE STATE OF NEW YORK, et al.,

Plaintiff(s),

v.

PRIMESTAR PARTNERS L.P., et al.,:

Defendants.



No. 93 Civ. 3868 (JES)

JOINT AMICUS CURIAE MEMORANDUM OF LAW OF DirecTv, INC., NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE, CONSUMER FEDERATION OF AMERICA AND TELEVISION VIEWERS OF AMERICA, INC.

John B. Richards (1574)
Christine M. Gill
KELLER & HECKMAN
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210

Attorneys for National Rural Telecommunications Cooperative

Gary R. Frink (9840)
President
1730 K Street, N.W.
Suite 304
Washington, D.C. 20006

Television Viewers of America, Inc.

Gary M. Epstein (4780)
Edward J. Shapiro
Nicholas W. Allard
James H. Barker
Alan L. Bushlow
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

Attorneys for DirecTv, Inc.

Andrew Jay Schwartzman (5430)
Media Access Project
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 232-4300

Attorney for Consumer Federation of America

July 16, 1993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER

I. PRELIMINARY STATEMENT

This case arises from the cable industry's monopolization of the multichannel video distribution market. By engaging in widespread unfair and discriminatory practices against emerging Multichannel Video Programming Distributors ("MVPDs")[1/] the cable industry has denied to consumers the benefits of competition and the ability to receive a wide variety of programming from diverse sources.

On June 9, 1993, forty States and the Justice Department filed proposed consent decrees (the "Decrees")[2/] in this Court to settle antitrust lawsuits which sought to "enjoin, restrain and remedy monopolistic and anticompetitive conduct" within the multichannel video distribution industry.[3/] The lawsuits arise from an antitrust investigation into the formation of Primestar Partners, L.P. ("Primestar"), a medium-power direct broadcast satellite ("DBS") multichannel pay television service[4/] founded by seven of the

---

1. MVPDs are entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, MM Docket No. 92-265 (released April 30, 1993), at 3, ¶ 6 n.3 ("Program Access Order"). For the convenience of the Court, the full text of the Program Access Order appears at Appendix 1.

2. Three Decrees were filed in the actions brought by the States: 1) the Primestar Decree; 2) the Viacom Decree; and 3) the Liberty Media Decree. The Liberty Media Decree is actually styled as an "Agreement." It is unclear whether it has been or will be submitted to this Court. In any event, it is an integral part of the settlement "package" and its contents are highly relevant. The operation of the three Decrees is explained in more detail below.

3. State of New York v. Primestar Partners, L.P. et al., Complaint, 93 Civ. No. 3868 (S.D.N.Y. June 9, 1993), at ¶ 1.

4. Medium-power DBS service utilizes a medium-power satellite, which can transmit to a dish between 2.5-5 feet in diameter and can be installed more cheaply than larger television receive-only ("TVRO") dishes. Medium power DBS was seen as a potential advance over lower power TVRO service in terms of being more competitive with cable. Primestar is presently the only operating medium-power DBS service. See United States v. Primestar Partners, L.P., et al., No. 93-Civ-3913, Competitive Impact Statement, 58 Fed. Reg. 33,948 (June 23, 1993) ("Competitive Impact Statement").